STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2007
v	No. 264599 Wayne Circuit Court
DARRYL GENE ORR, Defendant-Appellant.	LC No. 04-005075-01

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, arson over $20,000, MCL 750.74(1)(d)(i), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction, 23 to 45 years' imprisonment for the second-degree murder conviction, 12 to 24 years' imprisonment for assault with intent to murder conviction, one to ten years' imprisonment for the arson conviction, one to five years' imprisonment for the felon in possession of a firearm conviction, and five years' imprisonment for the felony-firearm conviction. We affirm.

Defendant fatally shot Erik Rex and Shanika Nevels and assaulted Sharron Orr, after suspecting that they were going to turn him in to police for reward money. Defendant did not deny that he committed the offenses, but he argued at trial that he was insane at the time. Defendant testified that he was hearing voices and was hallucinating and that he 'wasn't thinking right.' Defendant also testified that he was unable to control himself, that he could not resist the urges that came over him and that he "blanked out" for a second and when he "came to" he had the gun to his head. He denied any memory of the assaults. Sharron Orr testified that, while she thought defendant was acting "hyper" and Rex told defendant he was acting paranoid, defendant was acting like himself and nothing in his behavior leading up to the shootings caused her concern. Both the prosecution's expert and the defense's expert testified that defendant was not suffering from any type of mental illness, and that he was not unable to appreciate the wrongfulness of his conduct, at the time he committed the offenses.

Defendant first argues on appeal that the prosecutor presented insufficient evidence to support his convictions, and that he presented sufficient evidence of insanity to establish that he was not criminally responsible for his conduct at the time of the offenses. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo, in the light most favorable to the prosecutor, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). "Questions of credibility and intent should be left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Defendant argues that the prosecutor failed to prove that he was sane at the time he committed the offenses. However, the prosecutor is not required to prove that defendant was sane. Rather, defendant has the burden of proving the affirmative defense of insanity by a preponderance of the evidence. MCL 768.21a; *People v Mette*, 243 Mich App 318, 326-328; 621 NW2d 713 (2000); *People v Stephan*, 241 Mich App 482, 488-489; 616 NW2d 188 (2000). Thus, defendant's argument that the prosecutor failed to prove sanity is without merit. Further, to the extent that defendant argues that he presented sufficient evidence to establish legal insanity by a preponderance of the evidence, the prosecutor presented sufficient evidence to allow a rational trier of fact to reject defendant's insanity defense and to convict defendant of the charges against him.

To establish the affirmative defense of legal insanity, a defendant must show that, at the time of the offense, he had a mental illness or was mentally retarded and that, as a result, he lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or conform his conduct to the requirements of the law. MCL 768.21a(1). Here, defendant testified that he heard voices in his head and that he was hallucinating around the time of the crimes. And, there was lay witness testimony that, after the murders, defendant exhibited somewhat bizarre behavior. However, it is undisputed that defendant is not mentally retarded. And both the prosecution's expert and the defense's expert testified that defendant was not suffering from any type of mental illness at the time of the instant offenses, which conclusions are supported by defendant's actions during the relevant time period. Although defendant asserted that he "blanked out" just before he assaulted the victims, he provided a detailed description of the events leading up to and immediately following the assaults, omitting only the few seconds during which he fatally shot Rex and Nevels and attempted to shoot and then assaulted Orr. After the shootings, defendant disposed of Rex's and Nevels' bodies, destroyed the car in which their murders occurred and abandoned the gun. Defendant also phoned a friend, telling her that he had done something bad that he could not take back and he asked another friend to rent a hotel room for him, in which he hid from police. And there was lay testimony that, while defendant may have been "paranoid" about being apprehended in connection with another offense, he was not acting "crazy" or "out of his mind" at the time of the instant offenses. Viewing the evidence in the light most favorable to the prosecutor, and leaving questions of credibility and intent to the jury, there was sufficient evidence presented at trial to support defendant's convictions.

Defendant next argues that the trial court erred by allowing the prosecution to strike a witness from its witness list at the start of trial, and by failing to issue a missing witness instruction for that witness. We disagree.

The trial court's decision to permit the prosecutor to add or delete witnesses to be called at trial is reviewed for an abuse of discretion. *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). This Court also reviews a trial court's determination of the prosecutor's due

diligence in producing a witness and the appropriateness of a "missing witness" instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). An abuse of discretion standard is more deferential than de novo review. It acknowledges that there will be circumstances in which there will be more than one reasonable and principled outcome. When the trial court selects one of the principled outcomes, there is no abuse of discretion and it is proper for the reviewing court to defer to the trial court's judgment. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4). The addition or deletion of the witnesses the prosecution would produce does not depend upon a showing of prior due diligence. *People v Burwick*, 450 Mich 281, 292; 537 NW2d 813 (1995). In this case, the prosecution intended to call the witness, who lived in Texas, only to establish the value of the car burned by defendant for purposes of the arson charge. Before trial, defense counsel agreed to stipulate to the value of the car. Then, on the day trial began, defense counsel notified the prosecution that he desired the witness for her testimony on other matters. On the basis of these facts, we conclude that the trial court did not abuse its discretion in allowing the prosecution to delete the witness from the witness list for good cause.

Further, because the witness was properly stricken from the witness list, the prosecutor was not obligated to produce her. Therefore, there was no basis for the trial court to inquire whether the prosecutor used due diligence to produce the witness for trial, or to give a missing witness instruction. And, contrary to defendant's assertions, defense counsel was not ineffective for failing to request a due diligence determination or a missing witness instruction. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant next argues that the trial court violated his constitutional rights by ruling that it would not instruct the jury on the insanity defense unless defendant testified. We disagree.

At the close of the prosecutor's case in chief, defendant moved for a directed verdict of acquittal, which was denied. Defendant also argued that he had elicited sufficient evidence during the prosecutor's case in chief to warrant the trial court instructing the jury on insanity. Defendant asked the court to rule on this issue, before he decided whether to testify or whether the defense would rest without presenting any evidence. The trial court advised defendant that there was not sufficient evidence elicited during the prosecutor's case in chief to permit an insanity instruction. Defense counsel then advised the trial court that defendant would testify on his own behalf. Following a short break in the proceedings, defense counsel asked the trial court to confirm that it had ruled that the evidence presented to that point was insufficient to warrant an insanity instruction. After further comment from the parties on the state of the evidence, the trial court explained that it would read the insanity instruction if defendant was going to testify, but that it would not do so if he did not testify.

Defendant argues on appeal that the trial court's ruling conditioned defendant's right to assert an insanity defense, and the giving of the insanity instruction, on defendant testifying, thus forcing him to choose between his constitutional rights to present a defense and to remain silent. However, defendant's argument mischaracterizes the trial court's ruling and the context in which

it was delivered. The trial court did not require that defendant testify in order to assert an insanity defense. Rather, the trial court ruled that defendant had elicited insufficient evidence during the prosecutor's case in chief to permit the jury to be instructed on insanity, and therefore, that defendant would need to present some additional evidence of insanity to warrant that instruction. Given that defendant's own expert determined that defendant was not legally insane at the time the offenses were committed, it was clear that the only evidence defendant was considering offering was his own testimony. Indeed, defendant called no other witnesses. A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding that defense. *People v Crawford*, 232 Mich App 608, 619; 591 NW2d (1998). Given the absence of other witnesses to establish the elements of an insanity defense on his behalf, defendant faced a strategic choice between remaining silent and asserting his chosen insanity defense. Defendant was not compelled by the trial court to choose whether to remain silent or to present a defense. Rather, this choice was a strategic matter, based on the available evidence. As such, the trial court's ruling did not impinge defendant's constitutional rights.

Defendant also argues that he was denied a fair trial by admission of improper character and hearsay evidence. We disagree. First, defendant did not preserve this argument for appeal because it is not within the scope of the questions presented, and thus, this Court would be justified in declining to review this issue at all. *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Second, as discussed below, defendant's assertions of error in this regard lacks merit.

Defendant asserts that testimony that he was featured on the television program "Detroit's Most Wanted" in relation to another alleged offense improperly brought his character into issue. Defendant did not object to this testimony at trial. Therefore, we review its admission for plain error. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.* at 763. And, the defendant bears the burden of persuasion with respect to prejudice. *Id.*

MRE 404(b)(1) governs a trial court's decision to admit or exclude other acts evidence. It provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Other acts evidence may be admitted where: (1) the evidence is offered for some purpose other than under a character-to-conduct theory, or a propensity theory, (2) the evidence is relevant to a fact of consequence at the trial, and (3) the trial court determines under MRE 403 that the

probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. "A proper purpose for admission [of other acts evidence] is one that seeks to accomplish something other than the establishment of a defendant's character and his propensity to commit the offense." *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). As with all evidence, other acts evidence is relevant if it is materially related to any fact that is of consequence to the action (other than a defendant's propensity to commit the charged offense) and has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. *People v Sabin*, 463 Mich 43, 56-57; 614 NW2d 888 (2000). "'Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.'" *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The trial court is in the best position to gauge the effect of such testimony. *People v Magyar*, 250 Mich App 408, 415-416; 648 NW2d 215 (2002). If requested, the trial court may provide a limiting instruction on the proper use of other acts evidence under MRE 105. *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

In this case, testimony that defendant was featured on "Detroit's Most Wanted," to publicize his status as a fugitive in connection with another alleged offense, was offered to explain why defendant suspected that people were after him, or might be plotting to turn him in to the police. This was a proper purpose under MRE 404(b). Such evidence was relevant to defendant's state of mind at the time of the offenses, because it provided an explanation, other than mental illness, for defendant's fear that Orr, Rex and Nevels were plotting against him. And it is unlikely that the jury would give undue weight to the fact that defendant was wanted for another crime when there was an eyewitness identifying defendant as the shooter and defendant himself confessed. Therefore, the trial court's admission of this evidence does not constitute plain error because the prosecution had a proper purpose, the evidence was relevant, and its probative value was not clearly outweighed by the danger of unfair prejudice.

Defendant also asserts that the trial court erred in permitting testimony that he had served time in prison, as well as in admitting the reports of psychiatrists who did not testify at trial. We disagree. Defendant objected to testimony that he previously was imprisoned. Therefore, we review the admission of that testimony for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, defendant did not object to the admission of the psychiatrists' report. Thus, we review admission of that evidence for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

The evidence about which defendant now complains was introduced during the testimony of Dr. Judith Block. Block testified that defendant had served time in prison and that, in the course of her evaluation of defendant, she reviewed the report of Dr. Richard Richman, who had opined that defendant was malingering and lying about his symptoms. Block also indicated that she relied on this evidence in forming her opinion regarding defendant's sanity. Generally, evidence underlying the basis of an expert opinion is admissible. *People v Pickens*, 446 Mich 298, 334-335; 521 NW2d 797 (1994); MRE 703; MRE 705. "Such evidence is relevant because it places the expert's opinions into a factual context, thereby enabling the trier of fact to determine the weight due an expert's opinion." *Pickens, supra* at 335. The evidence relied upon by the expert may include hearsay evidence. *People v Caulley*, 197 Mich App 177, 194-195; 494 NW2d 853 (1992).

Further, the trial court did not abuse its discretion when it found that the probative value of evidence that the defendant previously was imprisoned was not substantially outweighed by the danger of unfair prejudice. Defendant's familiarity with prison was relevant to his state of mind at the time of the offenses and was material to his paranoia regarding being apprehended. We also find it unlikely that such evidence would be given undue or preemptive weight by the jury considering the amount of evidence presented in this case, including eyewitness testimony and defendant's own statements. We also conclude that it was not plain error for the trial court to allow Block to testify regarding the reports she reviewed when forming her opinion as to defendant's mental condition at the time of the offenses. Those reports were relevant and defendant was able to cross-examine Block regarding their validity and value.

During her testimony, Block also mentioned that defendant was wanted for murder at the time of the instant offenses. Defendant objected to this testimony. The trial court sustained defendant's objection and provided a curative instruction to the jury. Defendant also moved for a mistrial, which the trial court denied. "The grant or denial of a motion for a mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted. The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice." *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999) (citations omitted). In this case, the fact that defendant was wanted for murder at the time of the instant offenses was mentioned once and the trial court immediately gave a curative instruction. We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Finally, defendant argues that an accumulation of other errors denied him a fair trial. We disagree. This Court reviews a defendant's assertion of cumulative error to determine if the combination of alleged errors denied the defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not, where the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.* at 388.

In addition to the alleged errors discussed above, defendant asserts that the trial court erred by telling the jury that defendant had committed other crimes, rather than that he was wanted for other crimes. While the trial court did misspeak in this manner, it immediately corrected itself. Thus, this minor error was cured by the trial court's immediate correction.

Defendant also asserts that he was denied a fair trial after the trial court allowed a juror to return to the jury room after she sent a note to the judge saying she, too, suffered from depression. The juror only revealed that she suffered from depression after deliberations began. The record is not clear that this juror would have been dismissed for cause, or that defendant would have used a peremptory challenge to remove her, had she provided this information during voir dire. The juror advised the trial court that she could deliberate and nothing in the record suggests that defendant was prejudiced by her participation. We therefore conclude that the trial court did not err in denying defendant's motion for a mistrial on the basis of this juror's participation.

Defendant also asserts that the trial court erred in denying his motion for a mistrial after a deputy instructed that same juror to return to the jury room while the courtroom was cleared. Under MCR 6.414, the trial court must ensure that all communications pertaining to the case

between the court and the jury or any juror are made a part of the record. However, a deputy's administrative actions in clearing the courtroom are not communications subject to MCR 6.414. Therefore defendant was not entitled to a mistrial as a result of the deputy's actions.

Absent the establishment of errors, there can be no cumulative effect meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Prejudicial error has not been identified in this case. As discussed above, the errors defendant alleges are not errors at all. Therefore, we conclude that defendant was not denied a fair trial based on the cumulative effect of errors in his case.

We affirm.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra